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Pacific Indemnity v. Jerry G. Brereton : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PACIFIC INDEMNITY CO.,

Plaintiff and
Respondent,

vs.

JERRY G. BRERETON, FIRST SECURITY BANK OF UTAH, N.A., ZIONS FIRST NATIONAL BANK AND BONNEVILLE BANK,

Defendant and
Appellant.

88-0237-CA

Case No. 870334
Priority No. 14(b)

BRIEF OF RESPONDENT PACIFIC INDEMNITY COMPANY

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
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BRIEF OF RESPONDENT PACIFIC INDEMNITY COMPANY

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE LEONARD H. RUSSON

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Whether appellant failed to establish jurisdiction in this Court because no notice of appeal was filed within the time required by Rule 4(a), Rules of the Utah Supreme Court?

II. Whether this Court will assume the correctness of the lower court's judgment where, as here, appellant fails to cite the record to support its contentions on appeal?

III. Whether appellant's argument improperly raises and addresses defenses under Utah Code Ann. § 70A-3-419(3) and a defense of contributory negligence for the first time on appeal?

IV. Whether appellant is nevertheless ultimately liable as a matter of law, based upon either statutory liability resulting from warranty of title or upon collection ratification liability?

DETERMINATIVE RULES AND STATUTES

Utah Code Ann. § 70A-4-207 (1953, as amended)

Rule 4(a), Rules of the Utah Supreme Court

Rule 24(a)(6), Rules of the Utah Supreme Court

Rule 33(a), Rules of the Utah Supreme Court

Rule 59(e), Utah Rules of Civil Procedure

DISPOSITION IN THE LOWER COURT

The lower court granted respondent Pacific Indemnity Company's Motion for Summary Judgment for the reason that appellant Bonneville Bank's ("Bonneville") collection of check proceeds paid over forged indorsements from payor banks "did not constitute a ratification of appellant's delivery to the wrong person, [and] that Bonneville retained the check proceeds collected from payor banks in trust for [Pacific Indemnity] and [Pacific Indemnity] had a right to judgments on those funds." (Record at 288.)

STATEMENT OF CASE

Respondent Pacific Indemnity Company ("Pacific Indemnity") commenced the present action against all named defendants for recovery of losses resulting from an embezzlement scheme by which defendant Brereton, a salesman for California-based Triad Systems Corporation, endorsed and deposited into a personal checking account ten customer checks totalling $66,000.00 which were intended for his employer. Each of the converted checks was deposited in an account at appellant Bonneville Bank under the name "Jerry Brereton dba Triad Systems." (Record at 2-8; 152-153: [Affidavit of Jerry G. Brereton ("Brereton Affidavit") at ¶¶ 3-5 and attached exhibits].)

Brereton was able temporarily to mask his scheme through payment of $30,000.00 to his employer. His intentions to repay the full sum before discovery were not realized, however, and at the time his employer uncovered the scheme, there remained an unrecovered loss of $36,000.00, which was ultimately paid by Pacific Indemnity under employee fidelity coverage. (Record at 2-8, 151-70; [Brereton Affidavit at ¶ 6].)

Pacific Indemnity brought this action as subrogee to Triad's rights as the rightful owner of the converted instruments. The lower court granted Pacific Indemnity's Motion for Summary

Judgment against Bonneville Bank based on the ultimate liability of appellant Bonneville Bank as the collecting bank. (Record at 283-293.)

STATEMENT OF FACTS

1. Between approximately December 5, 1980, and June 16, 1981, Jerry Brereton forged indorsement to at least ten customer checks intended for Triad Systems Corporation and deposited those checks into his personal account at Bonneville in Provo, Utah, under the name of "Jerry Brereton dba Triad Systems," account no. 11-005139-9. (Record at 152: [Brereton Affidavit at ¶¶ 3-5 and Exhibits thereto].)

2. Of the checks involved, four were drawn upon and paid to Bonneville by First Security Bank of Utah, N.A. ("First Security") in amounts totalling $44,000.00. (Record at 126-34, 152-70: [Brereton Affidavit at ¶ 4 and Exhibits B-1, B-2, B-4 and B-8 attached thereto]; and [Affidavit of Joe F. Deniro at ¶¶ 8, 12, 16 and 20].)

3. The remaining six checks were drawn upon and paid to Bonneville by Zions First National Bank ("Zions") in amounts totalling $22,000.00 (Record at 152-70: [Brereton Affidavit at ¶¶ 4 and 5 and Exhibits B-3, B-5, B-6, B-7, B-9 and B-10 attached thereto].)

4. The initial endorsement on all checks was made by Jerry Brereton, who stamped "For deposit only Triad Systems

11-005139-9" on the reverse side of each check before depositing it in his account at Bonneville (Record 153: [Brereton Affidavit at ¶ 5].)

5. Mr. Brereton had no authority from his employer to deposit or otherwise negotiate customer checks. (Record at 158-60: [Brereton Affidavit at Exhibit "A-2"].)

6. On or about May 4 or 5, 1981, Mr. Brereton purchased and sent to Triad Systems Corporation a cashier's check in the amount of $20,000.00 purchased in the name of customer Five Star Motor Supply and a separate cashier's check in the amount of $10,000.00 purchased in the name of customer Number One Performance. (Record at 158-60: [Brereton Affidavit at Exhibit "A-2"].)

7. Triad Systems Corporation had no knowledge that Mr. Brereton maintained a personal account under the name of Triad Systems until approximately June, 1981. (Record at 158-60: [Brereton Affidavit at Exhibit "A-2"].)

8. Triad Systems Corporation recovered the net embezzlement loss caused by Mr. Brereton by collecting the same under employee fidelity insurance coverage furnished by Pacific Indemnity Company (Record at 153-54: [Brereton Affidavit at ¶ 6].)

9. By subsequent payments directly to Triad Systems Corporation, Mr. Brereton reduced the original debt to $26,038.07. (Record at 154: [Brereton Affidavit at ¶ 8].)

10. By motion for summary judgment dated April 8, 1987, plaintiff sought recovery of the remaining loss from defendants First Security and Zions, as drawee banks on the converted checks. (Record at 171-82.)

11. First Security and Zions in turn successfully moved on cross-claims against Bonneville for breach of express and statutory warranties as the depositary and collecting bank on Brereton's account. (Record at 241-42.)

12. Pacific Indemnity's Motion for Summary Judgment against Bonneville was granted based on the ultimate liability of a collecting bank for collection of monies paid over a forged endorsement. (Record at 241-43.)

13. Final judgment as to all the parties was entered on June 24, 1987 by Judge Leonard H. Russon of the Third Judicial District Court in and for Salt Lake County. (Record at 241-243.) See also Addendum "A."

14. On June 16, 1987, appellant Bonneville Bank filed a Motion for New Hearing (Record at 244-45) and later, on July 6, 1987, filed a motion to amend its Answer to plead contributory negligence against plaintiff. (Record at 274-75, 329-31.)

Appellant's motions were denied by Orders dated August 7th and 17th, 1987. (Record at 283-93.) See also Addendum "B."

15. Bonneville also filed a tardy Motion to Amend Judgment on August 20, 1987. (Record at 305-11.) The motion was denied by Court Order dated September 17, 1987. (Record at 329-30.) See Addendum "C."

16. Appellant Bonneville Bank filed no notice of appeal from the lower court's Judgment until September 9, 1987, more than seventy days after entry of final judgment. (Record at 326.). See Addendum "D."

SUMMARY OF THE ARGUMENT

The focus of Pacific Indemnity's response to Bonneville's attempted appeal is upon the multiple and significant procedural defects which independently justify affirmance of the summary judgment in favor of Pacific Indemnity as a matter of law.

Bonneville has not established jurisdiction in this court because of its failure to timely file required notice of appeal. Although the time for filing a notice of appeal may be tolled under Rule 59, Utah Rules of Civil Procedure through timely filing of (1) a motion for new trial; or (2) a motion to amend judgment, neither exception is applicable in the instant appeal. Neither a notice for new trial nor a timely motion to

amend judgment was filed by Bonneville. Hence Bonneville's time for filing a notice of appeal elapsed on July 24, 1987, more than forty days before Bonneville filed its tardy notice. Likewise, Bonneville's Motion for Rehearing could not toll the time for filing a notice of appeal because no such motion exists under the Utah Rules of Civil Procedure.

This Court should also assume the correctness of the judgment below because Bonneville does not support any of its contentions on appeal with citations to the record. Furthermore, Bonneville's contentions on appeal were not raised in the lower court until after entry of final judgment and thus should not be considered by this court.

Finally, Bonneville has not raised any dispute as to any material fact, except to the extent that it made an untimely motion to amend its answer 12 days after entry of final judgment, which motion was denied. Therefore, Pacific Indemnity was entitled to judgment as a matter of law because Bonneville is ultimately liable for checks paid over Jerry Brereton's forged endorsement either indirectly based on breach of warranty of good title under Utah Code Ann. § 70A-4-207 (1953, as amended), or directly based on a collection liability theory. Cooper v. Union Bank, 507 P.2d 609 (Cal. 1973). There being no error below, the judgment should be affirmed.

ARGUMENT

POINT I

BONNEVILLE FAILED TO ESTABLISH JURISDICTION IN THIS COURT.

There is no question that appellate jurisdiction arises only if a notice of appeal is filed within the time prescribed by Rule 4(a), Rules of the Utah Supreme Court:

> In a case in which an appeal is permitted as a matter of right from the district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . . .

In Barber v. Emporium Partnership, 76 Utah Adv. Rep. 8, 9 (Utah App. 1988) and Albretson v. Judd, 709 P.2d 347, 348 (Utah 1985), both of Utah's appellate courts confirmed that failure to give notice of appeal within the time prescribed by law leaves the appellate courts without jurisdiction.

Similarly, in Armstrong Rubber Co. v. Bastian, 657 P.2d 1346 (Utah 1983), this Court stated,

> The trial court therefore properly denied the motion for a "rehearing." Furthermore, the time within which defendant could have taken an appeal from the judgment was not tolled. . . . The purpose of Rule 73 is to make jurisdictional a failure to file a notice of appeal on time. The merits of the judgment therefore cannot be addressed on this appeal. (Citations omitted.)

Armstrong, 657 P.2d at 1348. See also Lord v. Lord, 709 P.2d 338 (Utah 1985).

A. Bonneville Failed To Timely File A Notice Of Appeal, Leaving This Court Without Jurisdiction To Consider The Lower Court's Summary Judgment.

In the instant case, Bonneville's docketing statement (itself untimely) clearly shows that the final amended judgment from which appellant now appeals was entered on June 24, 1987. Appellant was required to file its notice of appeal within thirty (30) days of that date or by July 24, 1987. Appellant failed to file its notice of appeal until September 9, 1987, 77 days after the date of entry of final judgment. (Record at 326.)

This Court has consistently dismissed appeals when a notice of appeal has not been timely filed. Since the Court similarly lacks appellate jurisdiction in this case, a dismissal of Bonneville's appeal is clearly appropriate.

B. The Time For Filing Appellant's Notice Of Appeal Was Not Extended For Any Reason.

Under appropriate circumstances, the time limit for filing a notice of appeal may be tolled. For example, under Rule 59, Utah Rules of Civil Procedure, a timely motion to amend the judgment may toll the 30 day notice of appeal requirement. However, Rule 59(e) specifically provides a mandatory 10 day limit on filing such a motion to amend. Accordingly, the fact that Bonneville did not file any appropriate motion within

times prescribed by law clearly demonstrates that the time for filing a notice of appeal ran without interruption from June 24, 1987 to July 24, 1984.

Thus, the time limits for filing Bonneville's notice of appeal were not extended by any recognized post judgment motions. Although Bonneville did file a "Motion for New Hearing" after the trial court's ruling, granting Pacific Indemnity's Motion for Summary Judgment, that motion was denied, and Judge Russon observed at that time, consistent with this Court's holdings, that no motion for "reconsideration" or "rehearing" exists under the Utah Rules of Civil Procedure and that such motions are improper. (Record at 292.)

In Drury v. Lunceford, 18 Utah 2d 74, 415 P.2d 662 (1966), the plaintiff attempted to file a motion for reconsideration in order to set aside a judge's order granting a new trial. In response, this Court held that:

> If the party ruled against were permitted to go beyond the rules, make a motion for [reconsideration], and persuade a judge to reverse himself, the question arises, why should not the other party who he has now ruled against be permitted to make a motion for reconsideration, asking the court to again reverse himself.

Id. at 663. This Court stated that under such circumstances "a judge could go on reversing himself periodically at the entreaties of one or the other of the parties ad infinitum." Id. See also Peay v. Peay, 607 P.2d 841, 843 (Utah 1980).

Inherent in this court's condemnation of motions for rehearing is the realization that allowing a motion for rehearing would create "an unsatisfactory situation . . . if a judge could carry in his mind indefinitely a state of uncertainty as to what the final resolution of the matter should be." Id. Therefore, this court concluded:

> In order to avoid a state of indecision for both the judge and the parties, practical expediency demands that there be some finality to the actions of the court; and he should not be in the position of having further duty of acting as a court of review upon his own ruling.

Id. at 663-64.

This court's ruling in Drury was emphasized in Tracy v. University of Utah Hospital, 619 P.2d 340 (Utah 1980). In Tracy the plaintiff filed a motion to intervene. Hearing on the motion was duly held and it was denied by the trial court with prejudice. Thereafter the plaintiff filed another motion to intervene and styled it as a motion for "re-hearing." Id. at 342. This Court declared that a motion for re-hearing or reconsideration "may not be invoked to defeat the time limits for appeal of a final order. In any event, our rules of procedure make no provision for such a motion. . . ." Id. at 342. (Emphasis added.) See also Retherford v. Industrial Commission of Utah, 739 P.2d 76, 80 (Utah App. 1987) (holding

that period of time in which appellate jurisdiction must be established is unaffected by a motion for reconsideration.)

In the instant case, the appellant apparently contends that it was entitled to a rehearing because (1) as a result of "mistake" in assuming the Third Judicial District Court of Salt Lake County operated under Rule 2.8 of the Rules of Practice, it was inadequately prepared for a hearing on respondent's Motion For Summary Judgment; and (2) had appellant been allowed to prepare and submit an opposing affidavit, it may have been able to demonstrate a material issue of fact. Neither of these contentions justifies a rehearing and neither can toll the time for giving notice of appeal to establish appellate jurisdiction.

There is no provision in the Rules of Civil Procedure, to allow a court to reconsider or rehear a matter because a party argues that it might have done something different in light of the judgment ultimately entered. Even if such a motion were deemed to have been brought under Rule 60(b), it would not have tolled the time for appeal. Lord, 709 P.2d at 338, n. 1.

Appellant Bonneville's additional post judgment motions similarly cannot extend the 30 day time limit for filing a notice of appeal in violation of the Utah Rules of Civil Procedure. Bonneville's tardy Motion to Amend Answer cannot toll the time for filing a notice of appeal, especially where the motion was filed after entry of final judgment. Moreover,

Bonneville fails to raise any issue as to the propriety of the lower court's denial of the Motion to Amend Answer.

The Motion to Amend Judgment, similarly, was not a timely motion for post judgment relief and did not otherwise toll or extend the time for filing a notice of appeal from the June 24 Judgment. Rule 59(e), Utah Rules of Civil Procedure clearly provides that "a motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment." (Emphasis added.) In the instant case, appellant did not file its Motion to Amend Judgment until August 20, 1987, more than 50 days after entry of judgment. (Record at 330-31.) Because of its untimely filing, appellant's Motion to Amend could not alter the mandatory time for filing a notice of appeal, which had already elapsed on July 24, 1987.

Furthermore, appellant's motion was without authority under the Rules of Civil Procedure because it impermissibly sought to amend only the date of entry of judgment apparently for the purpose of extending time to file a notice of appeal. Even if such a motion were allowed, appellant's motion falls far outside the maximum period of time allowed by Rule 59(e). See Hume v. Small Claims Court of Murray City, 590 P.2d 309 (Utah 1979).

Thus, pursuant to the Rules of Civil Procedure and this Court's decisions, Bonneville's attempts to manufacture an

excuse to defeat the mandatory time limits set for giving notice of appeal from a final judgment must be considered inappropriate and unavailing.

POINT II

THIS COURT SHOULD ASSUME THE CORRECTNESS OF THE JUDGMENT BELOW BECAUSE APPELLANT FAILED TO REFER TO ANY PORTION OF THE RECORD THAT FACTUALLY SUPPORTS ITS CONTENTIONS ON APPEAL.

This Court has consistently held that it will assume the correctness of the judgment below, where, as here, an appellant does not support facts set forth in his or her Brief with citations to the Record. Trees v. Lewis, 738 P.2d 612, 613 (Utah 1987) and State v. Tucker, 657 P.2d 755, 756-57 (Utah 1982). In Trees, this Court declared that it:

> will assume the correctness of the judgment below where counsel on appeal does not comply with the requirements of Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, as to making a concise statement of facts and citation of the pages in the record where they are supported. (Citations omitted.)[1]

In Trees, the fact statement in the appellant's Brief referred to documents by their exhibit numbers, but contained no

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[1]Rule 24(a)(6), Rules of the Utah Supreme Court, which became effective in April 1987, ultimately replaced former Utah Rule of Civil Procedure 75(p)(2)(2)(d), but did not alter the requirement that citations to the record to support the fact statement in the Briefs. See Trees, 738 P.2d at 613, n.3.

citations to the Record. Occasional references to the record appeared in the Argument section of the Brief. Trees, 738 P.2d at 612, n.2.

Similarly, in State v. Tucker, 657 P.2d 755, 756-57 (Utah 1982), this Court concluded that:

> A separate and independent basis for the affirmance of the trial court is that the defendant failed to refer to any portion of the record that factually supports his contention on appeal.

In the instant case, and despite references to exhibits and affidavits, Bonneville makes no reference whatsoever to the Record to support any factual contentions. Accordingly, this Court should assume the correctness of the judgment below and may affirm that judgment on this independent basis.

POINT III

BONNEVILLE'S IMPROPERLY RAISED CONTENTIONS AND DEFENSES CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

This Court has forcefully and consistently held that it will not consider issues raised for the first time on appeal. Sorensen v. Larsen, 740 P.2d 1336 (Utah 1987); Topik v. Thurber, 739 P.2d 1101, 1103 (Utah 1987); Insley Manufacturing Corp. v. Draper Bank & Trust, 717 P.2d 1341, 1347 (Utah 1986).

This Court has stated that the record must clearly show that an issue was "timely presented to the trial court in a

manner sufficient to obtain a ruling thereon. We cannot assume that it was properly raised." Franklin Financial v. Empire Development Co., 659 P.2d 1040, 1044 (Utah 1983). If a party fails to present an issue to the trial court, they will have "waived the right to raise it" on appeal. Utah County v. Brown, 672 P.2d 83, 85 (Utah 1983).

In the present case, Pacific Indemnity's Motion for Summary Judgment was served by mailing May 26, 1987, and actually received by appellant on May 28, 1987. (Record at 288-93.) Even Local Rule 2.8(b) (under which Bonneville claims to have been operating), appellant was required to serve counter affidavits and any memorandum of points of authorities opposing the motion within ten days of May 28, or by June 8, June 7 being a Sunday. Id. See also Rule 3(i), Rules of Practice In the Third Judicial District Court of the State of Utah. No such statement, or counter affidavits were filed by Bonneville. Pacific Indemnity's motion was heard on June 8, 1987 and appellant appeared at the hearing through counsel. Id.

Only after Pacific Indemnity's Motion for Summary Judgment was granted by the court, did Bonneville react, filing (1) a Motion for Rehearing dated June 16, 1987; (2) a Motion for Leave to Amend Answer to the Complaint, dated July 6, 1987; and (3) a Motion to Amend Judgment, dated Aug. 20, 1987.

The only argument raised on appeal by Appellant that was even mentioned prior to this appeal relates to the attempted Amended Answer, alleging contributory negligence. However, the Motion to Amend Answer was not even filed until after entry of the final judgment, and was properly denied by the court. Bonneville does not dispute the propriety of the lower court's Order, denying the motion to amend.

It is obvious that the defenses raised and argued on appeal by Bonneville were not presented to the trial court in a manner sufficient to obtain a ruling thereon because they were not even raised until after final judgment was entered. Accordingly, the arguments and defenses raised by appellant relating to (1) Utah Code Ann. § 3-419(3); (2) Utah Code Ann. § 70A-3-406; (3) contributory negligence; and (4) collection ratification, along with cited cases and authorities cannot be considered by this court for the first time on appeal. Appellant did not raise any of the above described contentions and defenses in its Answer (Record at 17-19), or in its memorandum in opposition to Pacific Indemnity's Motion For Summary Judgment, (Record at 142-46). Indeed, Bonneville acknowledged ultimate liability according to the "standard collection process." Id. at 143. The first mention of any defense argued by appellant on appeal was raised on either July 6, 1987 or later, which was at least 12 days after entry of final judgment in this matter. By

failing to timely present these arguments and defenses to the lower court in a manner sufficient to obtain a ruling thereon Bonneville waived its right to raise them on appeal. Brown, 672 P.2d at 85.

POINT IV

APPELLANT BONNEVILLE BANK IS NEVERTHELESS ULTIMATELY LIABLE AS A MATTER OF LAW, BASED ON EITHER (1) STATUTORY LIABILITY OF THE COLLECTING BANK RESULTING FROM WARRANTY OF TITLE UNDER UTAH CODE ANN. § 70A-4-207; OR (2) DIRECT COLLECTION RATIFICATION LIABILITY, AND SUMMARY JUDGMENT WAS PROPER.

Summary judgment is appropriate if there is no genuine dispute as to a material fact and if the movant is entitled to judgment as a matter of law. Horgan v. Industrial Design Corp., 657 P.2d 751, 752 (Utah 1982). See also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In the instant case, the trial court granted Pacific Indemnity's Motion for Summary Judgment, ruling that,

> . . . Bonneville Bank was liable on the checks paid over on Brereton's forged endorsements. The plaintiff [Pacific Indemnity] alleges [in its supporting memorandum] that 3-419(1)(c) does not pertain to Bonneville Bank in this instance, since it is not a representative of the type to which that section was inteded to apply and, in any event Bonneville Bank holds all proceeds on the instruments in trust and, therefore, it is not entitled to a good faith defense. The plaintiff [Pacific indemnity] cited Goslin v. Awood, 283 N.W.2d 691, and Cooper v. Union, 507 P.2d 609.

* * *

> The Plaintiff's [Pacific Indemnity's] Motion was granted for the reasons set forth in its Memorandum of Points and Authorities and supporting Affidavits.

(Record at 290 and 292.)

Bonneville is ultimately liable to Pacific Indemnity either indirectly as a result of its breach of statutory warranty of good title under Utah Code Ann. § 70A-4-207 (1953 as amended) or directly upon a theory of collection ratification. In either event, Bonneville is ultimately liable for the converted checks paid over forged endorsements as a matter of law. Therefore, summary judgment is appropriate because Bonneville has not properly raised any genuine issue as to a material fact and has in fact acknowledged ultimate liability of the "standard collection process." (Record at 143.)

A. Bonneville Bank is Statutorily Liable to Pacific Indemnity.

The "statutory approach" originally relied upon by Pacific Indemnity in its pleading and initial motions against Zions and First Security Bank follows a simple formula that finds the drawee banks (Zions and First Security) strictly liable for payment of checks over Brereton's forged endorsements under Utah Code Ann. § 70A-3-419(2) and, in turn, entitles the drawee banks to pass the resulting loss or liability "upstream" to the depository bank (appellant Bonneville) for breach of statutory warranty of good title under Utah Code Ann. § 70A-4-207. As

noted above, the statutory approach effectively passes strict loss liability for checks paid over the forged endorsement, through the drawee banks, to the collecting bank.

In Cooper v. Union Bank, 507 P.2d 609 (Cal. 1973), relied upon by the lower court in this case, the California Supreme Court recognized the statutory approach, holding that a drawee bank is "in effect strictly liable to the true owner if it pays an instrument on a forged endorsement . . . ." The California Court also recognized the traditional "general bank collection theory" that "the true owner, in bringing an action against a collecting bank for conversion of a check collected on the forged endorsement, is deemed to have ratified the collection of the proceeds from the payor bank." Id. at 614.

Thus, while recognizing the clear statutory rule, the Cooper court questioned the necessity of such a route of recovery and relied upon a theory of "collection ratification" to hold the collecting depository bank directly liable to a converted check's owner, without requiring the owner first to proceed against the drawee banks. See Cooper, 507 P.2d at 615, n.6, and 617. The Court justified the reasonableness of its decision, as follows:

> Because liability ultimately rests with the first collecting bank, it is unlikely that such a bank was intended to have a ready defense in a direct suit by the true owner. Requiring cumbersome and uneconomical circuity of action to achieve an identical result

> would obviously run contra the code's explicit underlying purposes to simplify, clarify and modernize the law governing commercial transactions.

Id. at 617.

As discussed below, the end result under the "collection" rule likewise justified the lower court's ruling that Bonneville, as collecting bank, is ultimately responsible for the plaintiff's loss, such liability in fact lies as a matter of law, under any alternative theories of recovery.

B. Bonneville Bank is Liable to Respondent on a Direct Collection Theory.

The collection theory ultimately followed by the Cooper court yields a practical rule of absolute liability for appellant Bonneville as the collecting bank, though by a path somewhat different than that mapped by the statutory language.[2]

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[2]As stated in that case, "dominant precode law established . . . that the proceeds were held, after collection by the collecting bank, for the benefit of the true owner. Again resorting to general banking theory, we find that the amounts a collecting bank remits to a person who transfers to the bank a check bearing a forged endorsement do not constitute the proceeds of the instrument." Id. at 614. Further, the "collecting bank must be deemed to retain the proceeds of the instruments . . ., regardless of whether those instruments were cashed or accepted for deposit." As similarly observed in Ervin v. Dauphin Deposit Trust Company, 3 UCC Rep. 311, 319 (Pa. 1965), when [the collecting bank] purchased or cashed the forged checks drawn on other banks it did so with its own money and then, in putting them through for collection it obtained from the drawee banks money which belongs to the plaintiff." See Cooper, 507 P.2d at 616, n.12.

It is apparent from consideration of the Cooper opinion that the ratification theory is not a rule intended to absolve drawee banks from liability to the true owner of a converted instrument under 3-14(1) (c), or otherwise to deprive the owner of its rights to recover the conversion laws. The circumstances of that case simply furnished the court a vehicle to promote a direct right of action by the owner against the depository bank, (a right not otherwise clear under the UCC). The court thus effectively shifted the conversion laws from the drawees to the depository bank in furtherance of the uniformly recognized principal that "irrespective of the sequence of suits or settlements, the law should normally come to rest upon the first assaulted party [i.e. the first collecting bank] in the stream after the one who forged the endorsement. (Emphasis added.) White & Summers, Uniform Commercial Code 581 (2d Ed. 1979).

In its Minute Entry ruling on plaintiff's Motion for Summary Judgment against Zions and First Security, the trial court held that the Cooper decision was applicable in this jurisdiction. and dismissed plaintiff's action against those banks. (Record at 203-05.) If Cooper is to be followed so far as to excuse the drawee banks from otherwise clear statutory liability upon plaintiffs having named Bonneville Bank as a

co-defendant in its Complaint, the reasoning should be followed to its conclusion: (1) that any "ratification" of Bonneville's collections from Zions and First Security implied by the structure of plaintiff's Complaint "does not constitute a ratification of appellant Bonneville Bank's delivery of the proceeds to the wrong person," [Cooper, 507 P.2d at 614]; (2) that Bonneville thus retains the check proceeds collected from both Zions and First Security in trust for respondent Pacific Indemnity; and (3) that plaintiff has a clear right to recover those funds upon judgment against Bonneville to the extent of its principal loss, with appropriate pre-payment interest. See Aetna Casualty & Trust Co. v. Helper State Bank, 630 P.2d 721, 728-29 (Utah 1981). This is the ultimate conclusion reached by the trial court, and accords, in final result, with the weight of authority that collecting banks are and should be directly liable to a check's owner, for payment of the check over a forged endorsement.

CONCLUSION

This Court may properly affirm the decision of the lower court for numerous independent reasons. First, Bonneville failed to establish appellate jurisdiction with this Court because it failed to timely file its Notice of Appeal. Second,

this Court should assume the correctness of the judgment below because Bonneville failed to cite the Record to support facts as required by Rule 24(a)(6), Rules of the Utah Supreme Court. Third, appellant's attempt to raise contentions and defenses for the first time on appeal, without raising such defenses in the lower court, should not be considered. Finally, appellant Bonneville Bank is clearly liable to respondent Pacific Indemnity Company (directly or indirectly) for payment of checks over Brereton's forged endorsement, and there was no error in the lower court's Summary Judgment. This is true under clear, uniformly recognized statutory language and likewise under the separate "general theory of bank collection" pronounced by California Supreme Court in Cooper v. Union Bank, in turn adopted by this court in its earlier rulings in this case.

Upon these undisputed facts, respondent Pacific Indemnity Company respectfully urges this court to affirm the trial court's summary judgment against Bonneville Bank as a matter of law. In addition, because this appeal not only lacks any reasonable or factual basis but also gives rise to fully independent and procedural grounds for affirmance, Pacific Indemnity

Company respectfully requests that it be awarded appropriate attorney's fees and costs.[3]

DATED this 18th day of March, 1988.

SNOW, CHRISTENSEN & MARTINEAU

By Larry R. Laycock
David W. Slaughter
Larry R. Laycock
Attorneys for Respondent
Pacific Indemnity Company

SCMLRL116

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[3]Rule 33(a), Rules of the Utah Supreme Court, provides that "[i]f the court shall determine that . . . [an] appeal taken under these Rules is frivolous . . . it shall award just damages and single or double costs, including reasonable attorney's fees, to the prevailing party." Under less egregious circumstances than those present in this case, the Utah Court of Appeals has determined that an award of costs and attorney's fees is appropriate under Rule 33. See Barber v. Emporium Partnership, 76 Utah Adv. Rep. 8, 9 (February 12, 1988).

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A. DENNIS NORTON (A2425)
DAVID W. SLAUGHTER (A2977)
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10 Exchange Place, Eleventh Floor
Post Office Box 45000
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Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

PACIFIC INDEMNITY COMPANY, Plaintiff, vs. JERRY G. BRERETON, FIRST SECURITY BANK OF UTAH, N.A., ZIONS FIRST NATIONAL BANK and BONNEVILLE BANK, Defendants.	)	JUDGMENT AND ORDER Civil No. C82-7259 Judge Leonard H. Russon

At hearing duly noticed before this Court on April 27, 1987, this Court considered plaintiff's Motion for Summary Judgment against defendants First Security Bank and Zions Bank, as well as Motions by First Security Bank and Zions Bank for partial summary judgment against defendant Bonneville Bank. David W. Slaughter appeared on behalf of the plaintiff, Gifford W. Price appeared on behalf of Zions First National Bank, Craig Carlile appeared on behalf of First Security Bank, and Douglas A. Baxter appeared on behalf of Bonneville Bank. At hearing, the Court also considered Motions made by First Security Bank and Zions Bank to dismiss plaintiff's claims

against them.

On June 8, 1987, the matter came up once again for hearing on plaintiff's Motion for Summary Judgment against Bonneville Bank. The above-identified counsel also appeared at that hearing on behalf of their respective clients.

The Court now having heard all arguments of counsel and having reviewed the memoranda on file and good cause otherwise appearing, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. That plaintiff be and hereby is granted summary judgment against Bonneville Bank in the amount of $26,038.07, plus interest thereon at the legal rate of ten percent (10%) per annum pre-judgment and twelve percent (12%) per annum from the date hereof until paid; and,

2. That plaintiff's actions against Zions First National Bank and First Security Bank of Utah, N.A. be and hereby are dismissed without prejudice; and,

3. First Security Bank of Utah, N.A. and Zions First National Bank be and hereby are granted summary judgment against Bonneville Bank for breach of actual and implied warranties of presentment except that claims by these banks for attorney's fees against Bonneville Bank are denied.

DATED this 15th day of June, 1987.

BY THE COURT:

LEONARD H. RUSSON, District Court Judge

H. DIXON [illegible]
Clerk

By _____
Deputy Clerk

CERTIFICATE OF MAILING

STATE OF UTAH)
ss.:
COUNTY OF SALT LAKE)

Cynthia Northstrom, being first duly sworn, states: That she is employed by the law offices of Snow, Christensen & Martineau, attorneys for plaintiff herein; that she mailed a true and correct copy of the foregoing Judgment and Order (proposed) postage prepaid, first class mail, on the 9th day of June, 1987, to:

Craig Carlile, Esq.
Ray, Quinney & Nebeker
400 Deseret Building
Salt Lake City, Utah 84111

Gifford W. Price, Esq.
Callister, Duncan & Nebeker
800 Kennecott Building
Salt Lake City, Utah 84133

Allen K. Young, Esq.
101 East 200 South
Springville, Utah 84663

Cynthia Northstrom
Cynthia Northstrom

SUBSCRIBED AND SWORN to before me this 9th day of May, 1987.

NOTARY PUBLIC
Residing in Salt Lake City, Utah

My Commission Expires:
May 26 1989

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PACIFIC INDEMNITY COMPANY, a California corporation,	:	ORDER
Plaintiff,	:	CIVIL NO. C-82-7259
vs.	:	
JERRY G. BRERETON, et al.,	:	
Defendants.	:	

On June 24, 1987 this Court entered an Amended Judgment and Order wherein it granted the plaintiff Summary Judgment against Bonneville Bank, granted Zions First National Bank and First Security Bank Orders of Dismissal without Prejudice as to plaintiff's Complaint against them, granted Zions and First Security Bank's Summary Judgment against Bonneville Bank for breach of warranty of presentment, breach of guarantee of endorsement, and breach of contract, and denied all parties claims for attorney's fees. This Amended Judgment and Order pertained to those motions which were heard on June 7, 1987.

Bonneville Bank moved for an order granting it a new hearing in this matter on the grounds that its attorneys were unaware of the Local Rules for Third District Court, thought they had additional time in which to obtain affidavits, and alleging that the case had been pending for several years, that an agreement

had been reached by all parties for the plaintiff to pursue only defendant Brereton and, therefore, no discovery was undertaken for those years, and that if Bonneville Bank had time, it could have procured affidavits establishing questions of fact requiring a trial.

Later, on July 6, 1987, Bonneville Bank moved to amend its Answer to the Complaint to allege contributory negligence.

A review of this matter is in order.

The Complaint was filed on September 8, 1982, wherein plaintiff sued Brereton for fraud, Zions First National Bank for conversion, First Security Bank for conversion, and Bonneville Bank for "knowingly or negligently converting or aiding in the conversion of property belonging to Triad Systems Corporation."

On October 15, 1982 Bonneville Bank answered, denying charging allegations, and alleging the affirmative defenses of estoppel and waiver wherein Triad gave Brereton direct or implied authority to negotiate checks written to Triad Corporation. It did not plead contributory negligence or any other matters as affirmative defenses.

On October 18, 1982 Zions Bank answered the Complaint, and crossclaimed against Bonneville Bank. Zions denied allegations and alleged the affirmative defenses of contributory negligence, estoppel, waiver or release, ratification, insufficient notice, laches, 405 and 406 defenses, and lack of capacity or standing to

sue. The Crossclaim against Bonneville alleged breach of warranty, and/or breach of indemnity, and/or contributory negligence.

On November 4, 1982 Bonneville Bank replied to Zions' Crossclaim denying charging allegations, but alleging no affirmative defenses.

On December 13, 1982 a Default Judgment was taken against defendant Brereton.

On July 16, 1986 First Security Bank answered the Complaint, and crossclaimed against Bonneville. The bank denied charging allegations in the Complaint, alleged the affirmative defenses of estoppel, authorization or ratification by Triad, 419(3) defenses of good faith consistent with reasonable commercial standards, laches, statute of limitations, insufficient claim time, and alleging plaintiff had actually received payment. The Crossclaim against Bonneville alleged similar allegations to those alleged by Zions Bank.

On December 26, 1986 First Security Bank filed a Motion for Partial Summary Judgment against Bonneville, and filed an affidavit of Joe DeNiro in support thereof. First Security alleged that Bonneville was the prior endorser, and thus liable to First Security for breach of warranty of good title and guarantee of prior endorsement. It alleged each check was endorsed by Brereton and presented to Bonneville for deposit in

an account opened by Brereton entitled "Triad Systems," that Bonneville endorsed each check following Brereton's endorsement, that Bonneville endorsed each check "prior endorsement guaranteed," that Bonneville presented the check to First Security for payment, which was paid by First Security.

First Security argued that both endorsements warranted that they had good title to each check, that Brereton's fraudulent endorsement constituted failure of good title in both Brereton and Bonneville Bank, and thus each breached warranty. They also argued that Bonneville Bank breached its guarantee of validity of all prior endorsements.

On February 18, 1987 attorney for Bonneville Bank acknowledged liability of Bonneville to First Security Bank, and indicated a willingness to indemnify First Security, which First Security rejected because it made claim to attorney's fees.

On the same date, Bonneville filed its Memorandum in Opposition to First Security's Motion for Summary Judgment, offering to sign indemnification agreement with said bank.

On April 9, 1987, the affidavit of defendant Brereton was filed, wherein he admitted the fraudulent scheme, and stated that Triad Corporation had no knowledge that he had paid towards the Judgment, and that a balance was existing of $26,038.07.

On the same date plaintiff filed a Motion for Summary Judgment against First Security Bank and Zions Bank, arguing that

the said banks were strictly liable to the plaintiff in light of Section 70A-3-419(1)(c) which provides that: "An instrument is converted when it is paid on a forged endorsement."

On April 14, 1987 Zions Bank filed a Motion for Partial Summary Judgment against Bonneville, with a supporting Affidavit of Donald Rocha, which indicated that the checks in question were processed on the basis of prior endorsement guarantees by Bonneville Bank.

On April 23, 1987 Zions filed a Motion to Dismiss plaintiff's Complaint.

On the same date, Zions Bank filed a Motion in Opposition to plaintiff's Motion for Summary Judgment, arguing that plaintiff's recovery should be only against Bonneville Bank as the depository or collecting bank which had begun the processing, and that plaintiff's action against Zions was not well-founded. The foregoing was based upon the argument that by plaintiffs suing both Zions Bank (drawee or payor bank) and Bonneville Bank (depository or collecting bank), the plaintiff had ratified the payment of proceeds by Zions to Bonneville Bank. Therefore, there was no cause of action for conversion against Zions Bank. The plaintiff did not sue Zions Bank for negligence. The only theory against Zions Bank was on conversion. Zions relied upon Cooper v. Union Bank, 507 P.2d 609 (Cal. 1973).

On May 1, 1987 this Court in a handwritten Memorandum Decision denied the plaintiff's Motion for Summary Judgment against Zions and First Security, indicating that the Cooper case was applicable, and granted the Motions of First Security Bank and Zions Bank on their Crossclaims, except as to attorney's fees.

On May 26, 1987 plaintiff filed a Motion for Summary Judgment against Bonneville Bank based upon the affidavits filed by Jerry Brereton, Joe DeNiro and Donald Rocha. In support thereof, plaintiff argued that following the Cooper case, if the payor banks (here, Zions and First Security) were free of liability because of ratification, then any ratification of Bonneville's collections from payor banks did not constitute a ratification of Bonneville's delivery to the wrong person, that Bonneville retained the check proceeds collected from the payor banks in trust for the plaintiff, and plaintiff had a right to Judgments on those funds.

A Notice of Hearing of Summary Judgment was filed with the Court on the same date, May 26, 1987, noticing the matter for June 8, 1987 at 10:00 a.m.

On June 8, 1987, the plaintiff's Motion for Summary Judgment against Bonneville Bank was heard. Attorney Doug Baxter appeared for Bonneville Bank. The other parties were represented. The Court granted plaintiff's Motion for Summary Judgment, and again

indicated that the Motions of the payor banks to dismiss were granted without prejudice. The claims for attorney's fees were denied.

On June 16, 1987 the Court signed and entered the written Judgment and Order granting plaintiff's Summary Judgment against Bonneville in the amount of $26,038.07, and dismissing plaintiff's claims without prejudice against Zions and First Security, and granting the Motions of First Security and Zions for Summary Judgment against Bonneville, which actually became moot, inasmuch as they were dismissed from the lawsuit.

On the same date, June 16, 1987, Bonneville Bank filed a Motion for a New Hearing, alleging that they had received the Summary Judgment on May 29, 1987, that Bonneville's counsel were unaware of the Third District's Local Rules, and thought Rule 2.8 applied, allowing them ten days in which to respond to the said motion, that they had made a mistake, and had not had time to prepare for the hearing with opposing affidavits, that there were material issues of fact that could be raised by affidavits as to a 3-419 defense of acting in good faith within commercially reasonable standards in cashing the checks of Brereton. This motion was supported by an Affidavit of Roger Bjornson, wherein he indicated the bank had no knowledge, and that they had acted reasonably.

On June 26, 1987 the plaintiff filed a Memorandum in Opposition to Bonneville Bank's Motion for New Hearing, taking the position that mistake as to Rule 2.8 did not justify a new hearing and that the Court could not grant a new trial per Rule 59, since no specific grounds were stated as required by that rule, that there should be no allowance for simply "mistaken assumptions," and, that in any case, there was no prejudice since the Bjornson affidavit was not sufficient in law as required by Rule 56, and even if it was, it was irrelevant since Bonneville Bank was liable on the checks paid over on Brereton's forged endorsements. The plaintiff alleges that 3-419(1)(c) does not pertain to Bonneville Bank in this instance, since it is not a representative of the type to which that section was intended to apply and, in any event, Bonneville Bank holds all proceeds on the instruments in trust and, therefore, it is not entitled to a good faith defense. The plaintiff cited Goslin v. Cawood, 283 N.W.2d 691, and Cooper v. Union, 507 P.2d 609.

On July 6, 1987 Bonneville Bank filed its Reply to the plaintiff's Memorandum, pointing out that the Complaint had been filed in 1982, that an agreement by all the parties was that plaintiff would pursue Brereton, that none of the parties undertook discovery during that interim period, that the Motion for Summary Judgment was filed on May 26, 1987, and not received by the bank until May 29, that the attorneys were unaware of the

Third District Rule and were unprepared at the hearing, and that under the Rules of Procedure should be granted a rehearing.

On July 6, 1987 Bonneville Bank filed a Motion to Amend its Answer to plead contributory negligence against the plaintiff.

Defendant Bonneville Bank argues that it thought Rule 2.8 of the Uniform Rules of Practice in District Courts was applicable and, therefore, was not prepared at the time of hearing on plaintiff's Motion for Summary Judgment. However, even allowing plaintiff application of Rule 2.8, instead of the Third District Local Rules, defendant did not comply with such rule. Rule 2.8 requires a responding party in a Motion for Summary Judgment to "file and serve upon all parties within ten days after service of the motion, a statement of answering points and authorities and counter affidavits." Rule 2.8, Rules of Practice in the District Courts of the State of Utah. The said rule further provides that "decisions shall be rendered without a hearing, unless requested by the court, in which event the clerk shall set a date and time for such hearing."

The plaintiff's Motion for Summary Judgment was served by mailing on May 26, 1987, and actually received by the defendant on May 28, 1987. Under Rule 2.8 the said defendant was required to serve counter affidavits and a statement of answering points and authorities within ten days of May 28, or by June 7 (actually June 8, June 8 being a Sunday). No such statement, nor

countering affidavits were filed. Therefore, there was nothing for the plaintiff to reply to.

The matter was heard on June 8, 1987, and the said defendant appeared through counsel.

It was only after the hearing on the said Motion for Summary Judgment which was granted by the Court that plaintiff filed for a new hearing, filed an affidavit, and filed a Motion for Leave to Amend its Answer to the Complaint to plead the affirmative defense of contributory negligence.

This matter has been pending since 1982, there have been several hearings prior to plaintiff's Motion for Summary Judgment attended by all parties, various pleadings indicate clearly issues as to negligence, the said defendant was put on timely notice, and received a copy of plaintiff's Memorandum of Points and Authorities.

There is no such motion as a motion for "reconsideration" or "rehearing." Armstrong Rubber Co. v. Bastian, 657 P.2d 1346 (Utah 1983); Peay v. Peay, 607 P.2d 841 (Utah 1980).

Bonneville Bank's Motion for a New Hearing is denied. The plaintiff's Motion was granted for the reasons set forth in its Memorandum of Points and Authorities and supporting affidavits.

Plaintiff's counsel will prepare the Order denying Bonneville's Motion for Rehearing.

Dated this_____day of August, 1987.

LEONARD H. RUSSON
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
Clerk
By C Pate
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order, postage prepaid, to the following, this 7 day of August, 1987:

David W. Slaughter
Attorney for Plaintiff
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Clifford W. Price
Attorney for Defendant Zions
800 Kennecott Bldg.
Salt Lake City, Utah 84133

Anthony W. Schofield
Craig Carlile
Attorneys for Defendant First Security
92 North University Avenue
Provo, Utah 84601

Allen K. Young
Attorney for Defendant Bonneville
101 East 200 South
Springville, Utah 84663

C Porter

SEP 17 1987

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PACIFIC INDEMNITY COMPANY, a California corporation,	:	RULING
Plaintiff,	:	CIVIL NO. C-82-7259
vs.	:	
JERRY G. BRERETON, et al.,	:	
Defendants.	:	

Defendant Bonneville Bank has filed a Motion for Amendment of Judgment and Objection to Order. A Memorandum of Points and Authorities has been filed in support thereof. Plaintiff has filed a Memorandum in Objection. The matter has been submitted to the Court for ruling without a hearing pursuant to Rule 3.

This Court granted plaintiff's Motion for Summary Judgment on June 8, 1987. Defendant received a copy of plaintiff's proposed Order and Judgment on June 10, 1987. The defendant then received an Amended proposed Judgment and Order on June 12, 1987. This Court signed and entered the initial Judgment on June 16, 1987, and the Amended Judgment on June 24, 1987.

On June 16, 1987 defendant Bank filed a Motion for Rehearing with a Memorandum in support thereof, and also an Objection to the proposed Order. (It is assumed that the Objection was actually received by the clerk's office, but apparently misplaced and actually dated filed on July 1, 1986.) No Objection to the

proposed Amended Order was ever filed. The Court signed the Amended Order and entered the same on June 24, 1987.

On July 26, 1987 plaintiff filed a Memorandum in Opposition to defendant's Motion for a Rehearing.

On July 6, 1987 defendant filed a Reply to plaintiff's Memorandum. The Reply was dated June 30, 1987. This Reply made no mention of objections to either the initial proposed Judgment, or the proposed Amended Judgment.

On July 16, 1987, defendant noticed up its Motion for New Hearing and Objections to the Proposed Judgment and Order. A hearing on July 27, 1987 resulted in denial of the same. The Court entered its Order denying the said Motion on August 7, 1987.

As this Court ruled earlier, there is no such motion as a Motion for New Hearing or Rehearing. The Amended Judgment was entered on June 24, 1987, twelve days after defendant received a copy of the proposed Amended Judgment. The effective date of the Amended Judgment herein is June 24, 1987. Orders on plaintiff's subsequent Motions bear their own effective dates. Plaintiff's Motion to Amend the Judgment is denied.

Dated this 17th day of September, 1987.

LEONARD H. RUSSON
DISTRICT COURT JUDGE

H. DIXON HINDLEY
Clerk

By _____
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling, postage prepaid, to the following, this 17 day of September, 1987:

A. Dennis Norton
David W. Slaughter
Attorneys for Plaintiff
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Anthony W. Schofield
Craig Carlile
Attorneys for Defendant First Security
400 Deseret Bldg.
P.O. Box 45385
Salt Lake City, Utah 84145-0385

Gifford W. Price
Attorney for Defendant Zions
800 Kennecott Bldg.
Salt Lake City, Utah 84133

Allen K. Young
Attorney for Defendant Bonneville Bank
101 East 200 South
Springville, Utah 84663

A L Lundberg

DAVID W. SLAUGHTER (A2977)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Plaintiff
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

PACIFIC INDEMNITY COMPANY,

Plaintiff,

vs.

JERRY G. BRERETON, FIRST SECURITY BANK OF UTAH, N.A., ZIONS FIRST NATIONAL BANK and BONNEVILLE BANK,

Defendants.

ORDER

Civil No. C87-7259 ~~C87-7259~~

Judge Leonard H. Russon

Defendant Bonneville Bank's Motion for Rehearing and separate Motion for Leave To Amend Its Complaint in the entitled action came on regularly for hearing before the entitled court on Monday, July 27, 1987, the Honorable Leonard H. Russon, presiding. Defendant, Bonneville Bank appeared through its counsel, Allen K. Young; Plaintiff Pacific Indemnity Company appeared through its counsel, David W. Slaughter.

The Court has heard and considered all argument of both parties, and has separately reviewed and considered the Memoranda offered by the parties in support of their respective positions.

The Court thus being fully advised in the premises and for good cause appearing, and upon its own decision and Order dated August 7, 1987, it is hereby

ORDERED, ADJUDGED and DECREED that Bonneville Bank's Motion for Rehearing on the Summary Judgment entered against it on June 16, 1987, in favor of Plaintiff, be and hereby is denied;

It is further ORDERED, ADJUDGED and DECREED, that Defendant Bonneville Bank's Motion to Amend its Answer be and hereby is denied.

DATED this ___ day of August, 1987.

BY THE COURT

ATTEST
H. DIXON HINDLEY
Clerk

By _____
Deputy Clerk

_____
Leonard H. Russon
Third District Court Judge

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Order was mailed, postage prepaid, with the U.S. Postal Service, to the following this 11th day of August, 1987:

Allen K. Young
101 East 200 South
Springville, Utah 84663

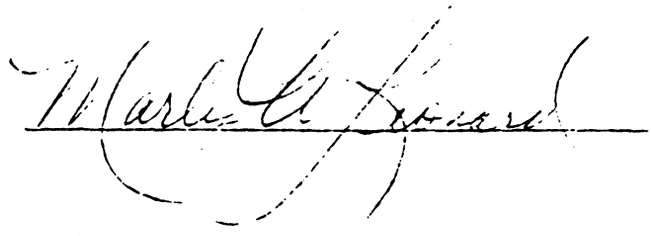
and to

Craig Carlisle
Ray, Quinney & Nebeker
92 North University Avenue
#210
Provo, Utah 84601

and to

Gifford W. Price
Callister, Nebeker & Duncan
800 Kennecott Building
Salt Lake City, Utah 84133

Case No. C83-7259



SEP

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PACIFIC INDEMNITY COMPANY, a California corporation,	:	RULING
Plaintiff,	:	CIVIL NO. C-82-7259
vs.	:	
JERRY G. BRERETON, et al.,	:	
Defendants.	:	

Defendant Bonneville Bank has filed a Motion for Amendment of Judgment and Objection to Order. A Memorandum of Points and Authorities has been filed in support thereof. Plaintiff has filed a Memorandum in Objection. The matter has been submitted to the Court for ruling without a hearing pursuant to Rule 3.

This Court granted plaintiff's Motion for Summary Judgment on June 8, 1987. Defendant received a copy of plaintiff's proposed Order and Judgment on June 10, 1987. The defendant then received an Amended proposed Judgment and Order on June 12, 1987. This Court signed and entered the initial Judgment on June 16, 1987, and the Amended Judgment on June 24, 1987.

On June 16, 1987 defendant Bank filed a Motion for Rehearing with a Memorandum in support thereof, and also an Objection to the proposed Order. (It is assumed that the Objection was actually received by the clerk's office, but apparently misplaced and actually dated filed on July 1, 1986.) No Objection to the

proposed Amended Order was ever filed. The Court signed the Amended Order and entered the same on June 24, 1987.

On July 26, 1987 plaintiff filed a Memorandum in Opposition to defendant's Motion for a Rehearing.

On July 6, 1987 defendant filed a Reply to plaintiff's Memorandum. The Reply was dated June 30, 1987. This Reply made no mention of objections to either the initial proposed Judgment, or the proposed Amended Judgment.

On July 16, 1987, defendant noticed up its Motion for New Hearing and Objections to the Proposed Judgment and Order. A hearing on July 27, 1987 resulted in denial of the same. The Court entered its Order denying the said Motion on August 7, 1987.

As this Court ruled earlier, there is no such motion as a Motion for New Hearing or Rehearing. The Amended Judgment was entered on June 24, 1987, twelve days after defendant received a copy of the proposed Amended Judgment. The effective date of the Amended Judgment herein is June 24, 1987. Orders on plaintiff's subsequent Motions bear their own effective dates. Plaintiff's Motion to Amend the Judgment is denied.

Dated this 17th day of September, 1987.

LEONARD H. RUSSON
DISTRICT COURT JUDGE

H. DIXON HINDLEY
Clerk

By _____
Deputy

D-2

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling, postage prepaid, to the following, this 17 day of September, 1987:

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101 East 200 South
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Telephone: 489-3294

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

--oooOooo--

PACIFIC INDEMNITY CO.,	:	NOTICE OF APPEAL
Plaintiff,	:	
vs.	:	
JERRY G. BRERETON, et. al.,	:	Civil No. C82-7259 Judge Leonard H. Russon
Defendants.	:	

--oooOooo--

TO THE PLAINTIFF AND ITS ATTORNEY, DAVID W. SLAUGHTER:

Notice is hereby given that defendant Bonneville Bank hereby appeals to the Court of Appeals for the State of Utah from the summary judgment entered in this action by the District Court for the Third Judicial District in and for Salt Lake County, State of Utah, on the 24th day of June, 1987, and from the subsequent denial of defendant's request for a new hearing and objections to the proposed order entered on August 19, 1987.

DATED this 3rd day of September, 1987.

ALLEN K. YOUNG
Attorney for Defendant J. F. Ollivier

I HEREBY CERTIFY that I mailed a copy of the foregoing, postage prepaid, this 3 day of September, 1987, to the following:

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Brenda Harding

CERITIFCATE OF SERVICE

I do hereby certify that on the 18th day of March, 1988, I caused four (4) true and correct copies of the Brief of Respondent Pacific Indemnity Company to be served upon the following:

Allen K. Young
Attorney for Defendant Bonneville Bank
101 East 200 South
Springville, Utah 84663

Larry K. Laycock.